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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

Cases:	Page
<i>American Hosp. Ass'n v. NLRB</i> , 499 U.S. 606 (1991)	12
<i>Anthony Forest Products Co.</i> , 231 N.L.R.B. 976 (1977)	9
<i>Florida Power & Light Co. v. International Bhd. of Electrical Workers, Local 641</i> , 417 U.S. 790 (1974)	7
<i>Fruehauf Trailer Co.</i> , 1 N.L.R.B. 68 (1935)	12
<i>General Cable Corp.</i> , 170 N.L.R.B. 1682 (1968)	5
<i>J.P. Stevens & Co. v. NLRB</i> , 380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967)	12
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992)	16
<i>Mailing Services, Inc.</i> , 293 N.L.R.B. 565 (1989)	5
<i>McCarty Processors, Inc.</i> , 286 N.L.R.B. 703 (1987)	5
<i>Multimatic Products</i> , 288 N.L.R.B. 1279 (1988)	17
<i>NLRB v. Allis-Chalmers Mfg. Co.</i> , 388 U.S. 175 (1967)	7
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990)	2, 16
<i>NLRB v. Great Dane Trailers, Inc.</i> , 388 U.S. 26 (1967)	15
<i>NLRB v. Savair Mfg. Co.</i> , 414 U.S. 270 (1973)	17
<i>Owens-Illinois, Inc.</i> , 271 N.L.R.B. 1235 (1984)	5
<i>Pattern Makers' League v. NLRB</i> , 473 U.S. 95 (1985)	7
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	13
<i>R.J. Lallier Trucking v. NLRB</i> , 558 F.2d 1322 (8th Cir. 1977)	7
<i>Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978)	12
<i>Sunland Construction Co.</i> , 309 N.L.R.B. 1224 (1992)	13, 15, 16
<i>299 Lincoln Street, Inc.</i> , 292 N.L.R.B. 172 (1988) ..	17
<i>Wagner Electric Corp.</i> , 167 N.L.R.B. 532 (1967) ..	5

Cases—Continued:

Page

<i>Willmar Electric Service, Inc. v. NLRB</i> , 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993)	17
--	----

Statutes:

Labor Management Relations Act, 1947, 29 U.S.C. 186(c) (1)	5
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 432(a) (5)	5
National Labor Relations Act, 29 U.S.C. 151 <i>et</i> <i>seq.</i> :	
§ 2(2), 29 U.S.C. 152(2)	2, 3
§ 2(3), 29 U.S.C. 152(3)	1, 2, 3, 14, 17
§ 7, 29 U.S.C. 157	2, 4, 7, 8, 12, 17
§ 8(a) (1), 29 U.S.C. 158(a) (1)	12

Miscellaneous:

Note, <i>Organizing Worth Its Salt: The Protected Status of Paid Union Organizers</i> , 108 Harv. L. Rev. 1341 (1995)	13, 17
Restatement (Second) of Agency (1958)	4, 9, 10
<i>Webster's New World Dictionary</i> (1962)	9

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1. Respondent's brief, like the decision below (see Pet. App. 7a-8a), is based on the premise that the text of the National Labor Relations Act (Act) is entirely unhelpful on the question whether a worker for hire or an applicant for such a position who will be paid by a union for his organizing activity is a statutorily protected "employee." Respondent argues (Br. 8, 10) that the Act's definition of "employee" in Section 2(3), 29 U.S.C. 152(3), is "circular" because it defines "employee" as "any employee" subject to seven specific exclusions; from this, respondent claims (Br. 10, 38-39) that it follows that whether a paid union organizer is an "employee"

must be answered wholly by reference to the common law of agency. Respondent, however, elects not to respond to our contention (Br. 17-20) that another provision of the Act—Section 7, 29 U.S.C. 157—supplies considerable guidance on that question. Section 7 guarantees “employees” the right to organize, and thus makes it clear that a worker who is otherwise a statutory “employee” (such as a worker for hire) does not forfeit that status by engaging in union organizing. Under the canon *expressio unius est exclusio alterius*, the absence of any exclusion in Section 2(3) for an employee who will be paid by a union for engaging in those protected organizing activities strongly implies that such a worker is a statutory “employee.” Thus, as we have explained (Br. 13-23), the Board’s interpretation that a paid union organizer is an “employee” within the meaning of Section 2(3) is correct, and, in any event, should be upheld as “rational and consistent with the Act.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990).

To the extent that respondent makes any statutory argument, it is that a paid union organizer is not an “employee” because an organizer works for a labor union, which, respondent asserts, is not an “employer” under Section 2(2) of the Act, 29 U.S.C. 152(2). Respondent therefore reasons, under Section 2(3), which excludes persons “employed by * * * any other person who is not an employer as herein defined,” 29 U.S.C. 152(3), that a union’s organizers cannot be statutory “employees.” See Br. 39 n.31; see also Chamber of Commerce Amicus Br. 22-29; Associated General Contractors of America Amicus Br. 9.

Respondent’s reliance on Section 2(2) is unpersuasive for two reasons, as the Board recognized in its decision. See Pet. App. 39a n.36. First, a labor union is an “employer” of its own employees, as the text of Section 2(2) makes clear. Section 2(2) provides:

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (*other than when acting as an employer*), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. 152(2) (emphasis added). More fundamentally, it is immaterial whether a worker’s union is a statutory “employer,” because the worker derives his status as a statutory “employee” not from his relationship with his union, but from his work status, or attempted employment, with the hiring entity in question. For example, an agricultural employee (who is excluded under Section 2(3)) who moonlights for another employer is not deprived of “employee” status at that second employer by virtue of the nature of his agricultural work for the first. Likewise, an employee of the United States (who is excluded under Section 2(3) because the United States is not an “employer” under Section 2(2)) may be a statutory “employee” in his capacity as a worker for hire at a second job. In short, the limitations on the Act’s definition of “employer” have no effect on the “employee” status of a paid union organizer

who works for, or applies for a job with, an entity that is a statutory "employer." And it is common ground that respondent Town & Country is such an "employer."

2. In any event, respondent misapplies the principles of common law agency on which it relies. As we show in our opening brief (Br. 23-33), those principles are fully compatible with deeming a paid union organizer an "employee."

a. Respondent's first common-law argument is that treating a paid union organizer as an "employee" conflicts with the precept that a person may not be an agent of an employer unless the person "is free to act in furtherance of the employer's interests and to submit to the employer's control." Br. 11. Respondent asserts (Br. 16-17, 20-23, 26) that workers for hire who are paid union organizers are beyond employers' control, and that the union organizers in this case were in fact under the "pervasive" control of the Union during work hours by virtue of the Union's salting resolution. As a result, respondent claims, it lacked the ability to direct their work or maintain discipline over them—"the basic elements [of a] *bona fide* employment relationship." Br. 25.

It is true that, at common law, a servant is a person "whose physical conduct in the performance of the service is controlled or is subject to the right to control" by his master or employer. Restatement (Second) of Agency § 2(2), at 12 (1958). But there is no foundation for respondent's claim that an employer is deprived of control over a union-organizing worker merely because a union pays that worker for engaging in that protected activity. As we have noted (Br. 25-26, 32), an employee's Section 7 right to organize leaves the employer free to impose work

rules (including rules that reasonably restrict organizing) and to discipline or discharge an employee who violates such rules. A union's agreement to pay an employee for organizing does no more than add an extra incentive to undertake such activity within those workplace rules. Indeed, the labor laws recognize that it is legitimate for an employee to receive pay from a union while working for an employer.¹

¹ The Labor Management Relations Act of 1947 and the Labor-Management Reporting and Disclosure Act of 1959 both recognize that a union may pay an employee for union service where the employee is also working for, and being paid by, an employer covered by the NLRA. See 29 U.S.C. 186(c)(1) (prohibition on employer payments to officers and employees of a labor organization does not apply to any such "officer or employee of a labor organization[] who is also an employee * * * of such employer"); 29 U.S.C. 432(a)(5) (requiring that officers and employees of labor organizations report any financial transaction with an "employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer") (emphasis added).

Respondent claims (Br. 20-21) that, in various cases, the Board itself has recognized that the payment of money or gifts "can, in effect, destroy the ability of an employee to act in the capacity of a *bona fide* independent employee." But the cases respondent cites concern the separate issue whether the integrity of a Board-supervised election was violated by virtue of preelection gifts to potential voters. See *Mailing Services, Inc.*, 293 N.L.R.B. 565 (1989); *McCarty Processors, Inc.*, 286 N.L.R.B. 703 (1987); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968); *Wagner Electric Corp.*, 167 N.L.R.B. 532 (1967). None of those cases suggests that the payment or gift deprived the subject individuals of their status under the Act as "employees."

Contrary to respondent's claim, the salting resolution (J.A. 256) to which the union members in this case were subject also did nothing to deprive respondent of control over those members. The resolution in no respect suggests that union members working for a nonunion employer should perform work in a subpar manner or violate work rules, and the record does not indicate that the Union sought to exercise any authority over the manner in which Malcolm Hansen, the one paid organizer whom respondent hired, performed his work for respondent. As we have noted (Br. 30-31), the resolution simply exempts union members from a provision in the Union's bylaws that forbade members from working for non-union employers, and the right reserved by the Union to withdraw that exemption leaves the union member free to elect to continue work for the employer and to resign from the Union. Moreover, to the extent that respondent was concerned that employees would prove transitory, it was free to inquire, pursuant to a union-neutral policy, whether applicants were aware of anything that could lead the applicant, if hired, to resign before a given term had run.²

² Respondent bases its claim that it was unable to exercise authority over Hansen on the fact that the Board rejected its attempt to discharge Hansen as unlawful. Br. 4, 5, 24-25. But the Board rejected as lacking credibility respondent's claim that Hansen's performance had been subpar and that Hansen had engaged in union-organizing activity during work time; instead, it found, based on testimony that it credited, that respondent had fired Hansen because he had engaged in protected organizational activity. Respondent's related claim (Br. 3 n.6, 8, 25 n.22) that the administrative law judge employed an unlawful presumption is unfounded and, in any

Respondent also claims (Br. 17-18) that salting resolutions such as the one in this case deprive union organizers of "their freedom to exercise any right under § 7 of the NLRA," such as the right to conclude that "the employees would be better off without the Union." On the contrary, the right of employees to form and join labor organizations, protected by Section 7, includes the right of a union to prescribe lawful rules for its members, including a rule that prohibits a union member from working for a non-union employer. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (union that fined members for crossing its picket line during strike did not commit unfair labor practice of restraining or coercing employees in exercise of Section 7 rights); *Florida Power & Light Co. v. International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 793 (1974). A union's discipline of a member who does not comply with the salting resolution does not abridge the member's Section 7 right to refrain from supporting the union, because, as we have noted, the member is free to escape discipline by resigning from the union. Cf. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 102-103 (1985) (noting that, "[t]raditionally, union members were free to resign and escape union discipline," and upholding finding that union committed unfair labor practice in levying fines for violating

event, that issue is not before this Court. The ALJ's decision (Pet. App. 43a-133a) sets out an ample factual basis for his findings of antiunion discrimination. Among those facts was respondent's opposition to the unionization of its employees. See *R.J. Lallier Trucking v. NLRB*, 558 F.2d 1322, 1325 (8th Cir. 1977) ("a general bias or hostility toward the union * * * are [*sic*] proper and highly significant factors for Board evaluation in determining motive").

union rule that forbade members to resign during a strike). Respondent's argument that a union member who agrees to abide by a rule which a union and its members have lawfully adopted is not engaged in concerted activity protected by Section 7, but is instead improperly "controlled" by the union, would eviscerate the Section 7 right to form and join labor organizations and the principle of voluntary union membership.

Respondent and its amici rely on selected union manuals and other materials outside the record of this case in an attempt to show that, as a rule, paid union organizers are directed not only to resign employment upon demand, but also to engage in disruptive activity while on the job. See Resp. Br. 18, 20, 28-30; Associated General Contractors of America Amicus Br. 12-14, 27-28; Labor Policy Association Amicus Br. 11-15. The organizers in this case, however, were subject to no such directive to engage in disruptive activity; moreover, respondent did not rely on such a theory when it fired Hansen for engaging in protected organizing activity, being unaware at the time that Hansen was working pursuant to a salting resolution or was being paid for his organizing efforts. See NLRB Br. 35. More generally, the Board in this case considered and rejected respondent's claim that paid union organizers as a class are more disruptive than other workers. See Pet. App. 37a ("No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in" acts "inimical to the employer's legitimate interests."). An employer may of course fire a paid union organizer who does engage in unprotected disruptive

practices and is free not to hire such an applicant if the applicant has signalled his intention to engage in disruptive activity if hired. See *Anthony Forest Products Co.*, 231 N.L.R.B. 976 (1977) (no violation in termination of paid organizer for just cause). The employer's latitude to take such action is illustrated by the case cited in the report of the General Counsel of the Board to which respondent repeatedly refers (Br. 18-19, 27, 30-31): in that case, the Board's General Counsel refused to issue a complaint regarding the discharge of paid union organizers who engaged in repeated disruptions of the employer's operations.

b. Respondent also asserts that treating a paid union organizer as an "employer" is inconsistent with a common-law principle which respondent characterizes as follows (Br. 12): "A person may not simultaneously be the agent of two masters with conflicting interests." Respondent, however, mischaracterizes the common law and, more fundamentally, fails to recognize that the Act has modified the common law by protecting the employee's right to engage in organizing activity.

Section 226 of the Restatement (Second) of Agency provides that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Thus, the touchstone for determining, under the common law, whether an individual may be the employee of two employers is not whether the interests of the two employers conflict in some respect, but whether, in working for one, the employee has "abandoned" his employment with the other. See *Webster's New World Dictionary* 2 (1962) ("abandon" means to "give up [something] completely," or "a complete

rejection of one's responsibilities"). The commentary to Section 226 makes clear that the issue of employee status is distinct from the issue whether the employee has breached a duty to the employer. It explains that, even where "giving service to two masters at the same time" involves "a breach of duty by the servant to one or both of them," a person "may cause both employers to be responsible for [that] act." Section 226, cmt. a, at 499. The commentary also notes that a person "may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both (see § 236)," and if the act is not such "as to which an intent to serve one necessarily excludes an intent to serve the other." *Ibid.* Section 236, in turn, provides (at 523) that "[c]onduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." The accompanying commentary explains that that rule applies to situations in which "the servant, although performing his employer's work, is at the same time accomplishing his own objects or those of a third person *which conflict with those of the master.*" Section 236, cmt. a, at 523 (emphasis added).³ Thus, the existence of a conflict between a worker's masters or employers

³ The Restatement offers the following example: "A, servant of P, is directed to deliver goods upon the route in a certain order. A, who has received a gratuity from T, a customer, makes delivery in inverse order. All the deliveries are within the scope of employment." Section 236, illus. 3, at 523. Thus, at common law, an individual remains within the scope of his employment, and therefore retains his status as an employee, even where he has been paid by a third party to perform his duties in a manner inconsistent with the employer's express instructions.

does not alone deprive the worker of "servant" or "employee" status, although it may, absent statutory protection for the activity that creates the conflict, supply a basis for lawful discharge of the worker.⁴

Under those principles, it is apparent that a worker such as Hansen does not "abandon" his "employee" status by receiving pay from a union for organizing the work force. The act of organizing does not inherently involve abandoning one's workplace duties or straying outside the scope of employment; on the contrary, until he was unlawfully discharged, Hansen reported to work daily and, as the ALJ found (Pet. App. 119a), properly performed his work as an electrician on respondent's jobsite.⁵ To the extent that an employer may rue the fact that an employee wishes

⁴ Thus, the common-law authorities upon which respondent relies (Br. 14 n.15) are inapposite, for they merely recognize the employee's duty of faithful service to the employer.

⁵ Advancing a new theory of abandonment, respondent suggests that Hansen was in fact employed by a different concern at the same time he worked for respondent, noting that "[t]he Union's records show that Hansen was employed by a Union contractor before, after and during the time he was ostensibly working" for respondent. Br. 5 n.10; see also Br. 25. Although the Union's hiring hall records appear to indicate that Hansen was employed by another electrical concern during that period, those records are apparently inaccurate, for, as respondent is well aware, Hansen could not have been working for another employer during the period he was employed by respondent. Respondent's work was performed at a remote site, and during his work for respondent, Hansen shared living quarters with respondent's other employees and was dependent on respondent for transportation to and from the jobsite. Pet. App. 81a, 85a, 94a, 101a n.61. Hansen's employment application (J.A. 194-196) indicates that he was last employed the month before he began work for respondent.

to engage in organizing or may regard a successful organizing campaign as potentially deleterious to its profitability, Section 7 of the Act, by giving protection to the right to organize, precludes an employer from claiming abandonment based on those concerns. See NLRB Br. 24-25, 32-33; see also Pet. App. 37a ("The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.").

3. Respondent (Br. 42-43) and its amici (Labor Policy Association Amicus Br. 20; Associated General Contractors of America Amicus Br. 26) also liken a union's practice of authorizing members to serve as paid union organizers while working for a nonunion employer to the impermissible employer practice of using employees to spy on co-workers' union activity. The analogy is fundamentally inapt. An employer's use of "spies" violates the Act because it tends to coerce and restrain employees' organizational activity while advancing no legitimate employer purpose. See *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 296 (2d Cir.) (upholding Board's finding that an employer's surveillance of union organizers' motel rooms and recruitment of antiunion employees to attend union meetings violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1)), cert. denied, 389 U.S. 1005 (1967); *Fruehauf Trailer Co.*, 1 N.L.R.B. 68, 73, 77-78 (1935). By contrast, as Section 7 of the Act reflects, organizational activity on behalf of a union "is at the very core of the purpose for which the [Act] was enacted," *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); see also *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991),

and, as the Board has noted, the Act presupposes "that an employee may legitimately give allegiance to both a union and an employer," Pet. App. 38a. See Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. 1341, 1356 (1995) ("The NLRA delimits the employer's control, absolute at common law, over organizational activity and forecloses the contention that loyalty to a union interferes with loyalty to the employer's and the employees' common enterprise."). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.").

4. In its brief supporting respondents, the Chamber of Commerce (Br. 14-19) notes that the Board has held that an employer, under the Act, may refuse to hire a paid union organizer during a strike. See *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1231 (1992). See also Amicus Associated General Contractors of America Amicus Br. 27. Noting that the

⁶ Because the Act presupposes no irreconcilable conflict between management interests and union organizing, amicus Chamber of Commerce errs in casting the paid union organizer (Br. 19) as "an agent of the employer's adversary." In any event, while nonunion employers who are "bent upon keeping their operations nonunion" may regard the presence of the paid union organizer in the workplace as "reminiscent of the Trojan Horse," *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1232 (1992) (Member Oviatt, concurring), the decisive fact under the Act is that, as Member Oviatt noted, "the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of 'employee,'" *ibid.*

Act protects employees' right to strike, the Chamber of Commerce argues that the Board's distinction between the strike setting (where an employer has the latitude not to hire an applicant based on his status as a paid union organizer) and the non-strike setting (where it does not) is "untenable" (Br. 16).

That argument is without merit. As we explain in our opening brief (Br. 27 n.11), the Board did not base its decision in *Sunland* on the premise that, during a strike, the paid union organizer is a non-"employee" under Section 2(3) of the Act and hence lawfully subject to antiunion discrimination. Rather, the Board held that a refusal to hire a paid union organizer in the strike context does not constitute unlawful antiunion discrimination, because, in that distinct context, the employer has a realistic basis for believing that a paid union organizer, if hired, will act to the detriment of the employer by encouraging other workers to strike. The Board explained:

In our experience, when a company is struck it is not "business as usual." The union and employer are in an economic battle in which the union's legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers, it can lock out the unit employees and it can hire temporary replacements for the locked-out employees. Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

Sunland Construction Co., 309 N.L.R.B. at 1230-1231 (footnotes omitted); see *id.* at 1231 ("given the conflict between an employer's interest * * * in operating during a strike and a striking union's evident interest in persuading employees *not* to help to operate, * * * the [employer] has a 'substantial and legitimate' business justification for declining to hire a paid agent of the Union for the duration of the strike") (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

The Board's distinction between the non-strike and strike contexts was reasonable. An employer ordinarily cannot refuse to hire a paid union organizer solely because of his status as such, the Board explained, because, absent a strike, there is no basis for inferring detriment to the employer. *Sunland Construction Co.*, 309 N.L.R.B. at 1231 n.41. Rather,

given the statutory protection for forming or joining unions, it cannot properly be said that there is any inherent conflict between carrying out the duties of an employee and operating as a paid union organizer. The aim of inducing fellow employees to join a union is entirely consistent with being a competent employee who obeys work rules such as those time-and-place restrictions on union solicitation that are lawful under *Republic Aviation Corp. v. NLRB* [324 U.S. 793 (1945)] and its progeny. Thus, although we would not permit an employer to presume generally that paid organizers will be disloyal employees, we see no problem with a presumption that someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's effort.

Ibid. Thus, the decision in *Sunland*, far from being a “paradox” (Chamber of Commerce Amicus Br. 15), reflects the Board’s sensitivity to the competing rights of management and of labor in the strike context, and its recognition that, in that discrete setting, legitimate predictions of deleterious employee behavior can be made based on an applicant’s status as a paid union organizer. *Sunland* does not undermine the Board’s determination that such organizers are, in all contexts, “employees” protected against unjustified antiunion discrimination.⁷

5. Finally, the Chamber of Commerce contends (Br. 12, 25) that, by treating paid union organizers as “employees,” the Board has executed an “end run” around *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which this Court upheld the right of employers to restrict the access of nonemployee or-

⁷ Attempting to undermine the distinction drawn by the Board in *Sunland*, the Chamber of Commerce (Br. 16) postulates that, if an employer hired a paid union organizer, and if the union then called a strike but instructed the organizer “to continue to work behind the picket line,” the employer would then be allowed, under *Sunland*, to discharge the same organizer whom, earlier, it had been forbidden to discriminate against in hiring. The Chamber of Commerce’s resolution of that farfetched hypothetical does not, however, follow from the Board’s decision in *Sunland*. *Sunland* involved an employer’s refusal to hire paid union organizers; accordingly, the Board did not attempt to balance the separate interests that would be implicated by the firing, during a strike, of an incumbent employee on account of his status as a paid union organizer. The Chamber’s real argument—that the *Sunland* exception should become the law in all contexts, not just the setting involving applicants during a strike—ignores Congress’s grant to the Board of “primary responsibility for developing and applying national labor policy.” *Curtin Matheson*, 494 U.S. at 786.

ganizers to their property. In vindicating the property rights of employers, however, the Court in *Lechmere* did not rely on Section 2(3) of the Act, nor did it limit the scope of Section 7’s protections of employee union activity. Workers for hire who do not fit within any of Section 2(3)’s specific exemptions are not outsiders, but are employees, and as such are lawfully on the employer’s property. Thus, as we note in our opening brief (Br. 27 n.12), the Board’s decision is completely consistent with *Lechmere*. See also Pet. App. 36a-37a; Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. at 1348-1350.⁸

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⁸ The Chamber of Commerce’s claim (Br. 21) that paid union organizers will interfere with Board representation elections is also meritless and, in any event, not presented by this case. As our opening brief points out (Br. 33 n.14), employee status is not synonymous with voting eligibility, and the Board has routinely denied voting rights to paid union organizers who do not intend to remain with the employer. See *Multimatic Products*, 288 N.L.R.B. 1279, 1316 (1988); *299 Lincoln Street, Inc.*, 292 N.L.R.B. 172, 180 (1988), and cases cited therein. While the paid union organizer’s “employment would give him a better perch from which to propagandize * * *, [that] would [also] be true for any union zealot who got a job with [the employer].” *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1330 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993). In any event, if an employer believes that the presence of paid union organizers has interfered with an election, the appropriate time to raise that contention is in the certification proceeding (see, e.g., *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 270-272 (1973)), not in an unfair labor practice proceeding arising out of a discharge or refusal to hire.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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